

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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| SAUNE G. EMORY, |) | Case No. CV 16-1103 JC |
| Petitioner, |) | |
| v . |) | MEMORANDUM OPINION AND |
| WARDEN NUNIZ, |) | ORDER GRANTING MOTION TO |
| Respondent. |) | DISMISS AND DISMISSING |
| |) | PETITION FOR WRIT OF HABEAS |
| |) | CORPUS AND ACTION WITH |
| |) | PREJUDICE |

I. SUMMARY

On February 11, 2016, petitioner Saune G. Emory (“petitioner”), a state prisoner proceeding *pro se*, constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”) by placing it in a United States Mail deposit box at the correctional institution at which he was then confined.¹ Petitioner, who was convicted of violating California Penal Code section 459 (burglary) in Los Angeles County Superior Court following a jury trial, claims: (1) the prosecutor committed misconduct in her opening statement by making numerous references to gang evidence for which she offered no proof at trial; (2) petitioner’s trial counsel was constitutionally ineffective because he failed to

¹See Houston v. Lack, 487 U.S. 266, 276 (1988).

1 move for a mistrial based upon the foregoing prosecutorial misconduct; and (3) the
2 trial court's jury instructions unfairly shifted the burden of proof and denied
3 petitioner his constitutional rights to a jury trial and due process. (Petition at 5-6).

4 On April 12, 2016, respondent filed a Motion to Dismiss the Petition
5 ("Motion to Dismiss" or "MTD") arguing, among other things, that the Petition is
6 time-barred. (MTD at 3-4). Respondent concurrently lodged multiple documents
7 ("Lodged Doc."). Petitioner did not file a response to the Motion to Dismiss and
8 the deadline to do so has long since expired.

9 Both parties have consented to having a United States Magistrate Judge
10 conduct all proceedings in this case, decide all dispositive and non-dispositive
11 matters, and order the entry of final judgment. (Docket Nos. 2, 11, 14).

12 Based on the record and the applicable law, the Motion to Dismiss is
13 granted and the Petition and this action are dismissed with prejudice because
14 petitioner's claims are time-barred.

15 **II. PROCEDURAL HISTORY**

16 On February 15, 2013, in Los Angeles County Superior Court ("Superior
17 Court") Case No. BA395791, a jury convicted petitioner of first degree residential
18 burglary. (Lodged Doc. 1). On September 20, 2013, the Superior Court sentenced
19 petitioner to seventeen (17) years in state prison. (Lodged Doc. 1).

20 On August 14, 2014, in Case No. B251821, the California Court of Appeal,
21 Second Appellate District, affirmed the judgment in a reasoned decision. (Lodged
22 Doc. 5). On November 12, 2014, in Case No. S221548, the California Supreme
23 Court denied review. (Lodged Doc. 9). The record does not reflect that petitioner
24 sought further direct review in the United States Supreme Court. Petitioner did
25 not file any habeas petitions in state court. (Petition at 3). The record does not
26 reflect that petitioner otherwise sought collateral relief in state court.

27 As noted above, petitioner constructively filed the instant federal Petition on
28 February 11, 2016.

1 **III. DISCUSSION**

2 For the reasons explained below, all of petitioner's claims are barred by the
3 governing statute of limitations, rendering the Petition and this action subject to
4 dismissal with prejudice.

5 **A. Accrual of the Statute of Limitations**

6 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),
7 110 Stat. 1214, a one-year statute of limitations exists for the filing of federal
8 habeas petitions by persons in state custody. See 28 U.S.C. § 2244(d)(1). The
9 limitation period runs from the latest of: (1) the date on which the judgment
10 became final by the conclusion of direct review or the expiration of the time for
11 seeking such review (28 U.S.C. § 2244(d)(1)(A)); (2) the date on which the
12 impediment to filing an application created by State action in violation of the
13 Constitution or laws of the United States is removed, if the applicant was
14 prevented from filing by such State action (28 U.S.C. § 2244(d)(1)(B)); (3) the
15 date on which the constitutional right asserted was initially recognized by the
16 Supreme Court, if the right has been newly recognized by the Supreme Court and
17 made retroactively applicable to cases on collateral review (28 U.S.C.
18 § 2244(d)(1)(C)); or (4) the date on which the factual predicate of the claim or
19 claims presented could have been discovered through the exercise of due diligence
20 (28 U.S.C. § 2244(d)(1)(D)).

21 The Court must evaluate the commencement of the limitations period on a
22 claim-by-claim basis. Mardesich v. Cate, 668 F.3d 1164, 1171 (9th Cir. 2012).
23 In this case, it appears that the statute of limitations on all of petitioner's claims
24 ran from the date on which the judgment in petitioner's case became final on
25 direct review.

26 Petitioner's conviction became final on February 10, 2015 – ninety days
27 after the California Supreme Court denied review on direct appeal (on November
28 12, 2015) – when the time to file a petition for a writ of certiorari with the United

1 States Supreme Court expired. See Jimenez v. Quarterman, 555 U.S. 113, 119
2 (2009) (“direct review cannot conclude for purposes of § 2244(d)(1)(A) until the
3 availability of direct appeal to the state courts, and to this Court, has been
4 exhausted”) (internal citations omitted); Zepeda v. Walker, 581 F.3d 1013, 1016
5 (9th Cir. 2009) (period of “direct review” after which state conviction becomes
6 final for purposes of section 2244(d)(1)(A) includes the 90-day period during
7 which the state prisoner can seek a writ of certiorari from the United States
8 Supreme Court) (citing Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999)).
9 Accordingly, the statute of limitations commenced to run on February 11, 2015,
10 unless subsections B, C or D of 28 U.S.C. § 2244(d)(1) apply in the present case.
11 See 28 U.S.C. § 2244(d)(1)(A).

12 Subsection B of 28 U.S.C. § 2244(d)(1) has no application in the present
13 case. Petitioner does not allege, and this Court finds no indication, that any illegal
14 state action prevented petitioner from filing the Petition sooner.

15 Subsection C of 28 U.S.C. § 2244(d)(1) also has no application in the
16 present case. Petitioner does not rely upon any constitutional right “newly
17 recognized by the Supreme Court and made retroactively applicable to cases on
18 collateral review.”

19 Nor does petitioner assert that subsection D of 28 U.S.C. § 2244(d)(1)
20 furnishes a later trigger date for the commencement of the statute of limitations.
21 Under Section 2244(d)(1)(D), the statute of limitations commences when a
22 petitioner knows, or through the exercise of due diligence could discover, the
23 factual predicate of his claims, not when a petitioner learns the legal significance
24 of those facts. Redd v. McGrath, 343 F.3d 1077, 1084 (9th Cir. 2003); Hasan v.
25 Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Section 2244(d)(1)(D) does not
26 require the maximum feasible diligence, but it does require reasonable diligence in
27 the circumstances. Ford v. Gonzalez, 683 F.3d 1230, 1235 (9th Cir. 2012). “[T]o
28 have the factual predicate for a habeas petition based on ineffective assistance of

1 counsel, a petitioner must have discovered (or with the exercise of due diligence
2 could have discovered) facts suggesting both unreasonable performance *and*
3 resulting prejudice.” Hasan, 254 F.3d at 1154 (9th Cir. 2001) (emphasis in
4 original). “[T]he petitioner bears the burden of proving that he exercised due
5 diligence, in order for the statute of limitations to begin running from the date he
6 discovered the factual predicate of his claim, pursuant to 28 U.S.C.
7 § 2244(d)(1)(D).” DiCenzi v. Rose, 452 F.3d 465, 471 (6th Cir. 2006). Here, as
8 noted above, petitioner does not assert that he discovered, or through the exercise
9 of diligence could not have discovered the factual predicates of any of his claims
10 until after the date on which his conviction became final and the statute of
11 limitations otherwise commenced to run. Indeed, petitioner challenges events
12 which occurred/failed to occur during trial – events about which petitioner knew,
13 or reasonably should have known no later than the date on which his conviction
14 became final.

15 Accordingly, the statute of limitations on all of petitioner’s claims
16 commenced to run on February 11, 2015, and absent tolling, expired on February
17 10, 2016 – one day before petitioner constructively filed the instant federal
18 Petition.

19 **B. Statutory Tolling**

20 Title 28 U.S.C. § 2244(d)(2) provides that the “time during which a properly
21 filed application for State post-conviction or other collateral review with respect to
22 the pertinent judgment or claim is pending shall not be counted toward” the one-
23 year statute of limitations period. Petitioner “bears the burden of proving that the
24 statute of limitations was tolled.” Banjo v. Ayers, 614 F.3d 964, 967 (9th Cir.
25 2010), cert. denied, 564 U.S. 1019 (2011).

26 Here, as noted above, petitioner did not file any state habeas petitions. Nor
27 does the record reflect that he otherwise sought collateral review in the state
28 courts. Accordingly, there is no basis to afford him statutory tolling.

1 **C. Equitable Tolling**

2 In addition to statutory tolling, the limitations period may also be subject to
 3 equitable tolling if petitioner can demonstrate both that: (1) he has been pursuing
 4 his rights diligently; and (2) some extraordinary circumstance stood in his way.
 5 Holland v. Florida, 560 U.S. 631, 649 (2010) (citations omitted). “[T]he threshold
 6 necessary to trigger equitable tolling is very high, lest the exceptions swallow the
 7 rule.” Mendoza v. Carey, 449 F.3d 1065, 1068 (9th Cir. 2006) (quoting Miranda
 8 v. Castro, 292 F.3d 1063, 1066 (9th Cir.), cert. denied, 537 U.S. 1003 (2002)).
 9 It is a petitioner’s burden to demonstrate that he is entitled to equitable tolling.
 10 Miranda v. Castro, 292 F.3d at 1065. Petitioner must prove that the alleged
 11 extraordinary circumstance was a proximate cause of his untimeliness and that the
 12 extraordinary circumstance made it impossible to file a petition on time. Ramirez
 13 v. Yates, 571 F.3d 993, 997 (9th Cir. 2009); Roy v. Lampert, 465 F.3d 964, 973
 14 (9th Cir. 2006), cert. denied, 549 U.S. 1317 (2007).

15 Here, petitioner does not argue, let alone meet his burden to demonstrate
 16 that he is entitled to equitable tolling. Nor does the record suggest any basis to
 17 believe that petitioner is entitled to equitable tolling. Accordingly, equitable
 18 tolling does not render the Petition timely filed.

19 **D. Conclusion**

20 As the statute of limitations on all of petitioner’s claims commenced to run
 21 on February 11, 2015, and as petitioner is not entitled to any tolling, the statute of
 22 limitations expired on February 10, 2016 – one day before petitioner
 23 constructively filed the instant federal Petition.

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IV. ORDERS

IT IS THEREFORE ORDERED: (1) the Motion to Dismiss is granted; (2) the Petition and this action are dismissed with prejudice because all of petitioner's claims are time-barred; and (3) the Clerk shall enter Judgment accordingly.

DATED: October 13, 2016

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE